Filed 4/23/20 Laudenback v. Superior Court CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BRIAN JOHN LAUDENBACK, Petitioner, v. THE SUPERIOR COURT OF ORANGE COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	G059035 (Super. Ct. No. 94HF0192) O P I N I O N

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, Cheri T. Pham, Judge. Petition granted.

Michael Evan Beckman for Petitioner.

No appearance for Respondent.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General for Real Party in Interest.

THE COURT:[1]

On December 17, 2019, the Board of Parole Hearings (BPH) recommended petitioner Brian John Laudenback's (petitioner) sentence be recalled and he be granted compassionate release pursuant to Penal Code section 1170, subdivision (e) (section 1170(e)). Respondent trial court declined to follow the recommendation. Petitioner contends the trial court used the wrong standard of review to consider the BPH's recommendation and abused its discretion when it concluded his release poses a threat to public safety. We agree and grant the petition.

FACTS

In 1995, a jury convicted petitioner of second degree murder for the death of the 22-month-old son of the woman with whom petitioner resided. The trial court sentenced petitioner to 15 years to life. We affirmed the judgment. (*People v. Laudenback* (G017881, May 27, 1997) [nonpub. opn.].)

In October 2019, petitioner was diagnosed with cancer. According to the compassionate release chrono dated October 17, 2019, petitioner suffered from stage IV bladder cancer with extensive bilateral lung metastases. The chrono, signed by Dr. F. Castrejon, stated petitioner's life expectancy was less than six months, he was "[v]ery unlikely to have any short term improvement," and his needs upon release would require "someone to provide food, shelter, transportation to any medical visits, someone to help

[1] Before O'Leary, P. J., Ikola, J., and Goethals, J.

set up hospice care at home or at a facility, [and he] will need assistance with medications."

On December 17, 2019, the BPH approved the recommendation petitioner's sentence be recalled. The BPH opined petitioner's sentence should be recalled and he should be resentenced "based on a finding that [petitioner] is terminally ill with an incurable disease that would produce death within six months and the conditions under which [petitioner] would be released would not pose a threat to public safety (to live with his mother)."

On December 20, 2019, the court filed a letter from the BPH recommending petitioner's sentence be recalled and petitioner granted compassionate release pursuant to section 1170(e).[2] The letter from Brian Kelley, BPH chief deputy, stated BPH commissioners considered the documents attached to the letter as the basis for its recommendation petitioner's sentence should be recalled. Those documents included petitioner's last comprehensive risk assessment dated September 12, 2016, the diagnostic study report prepared by Castrejon dated October 17, 2019, the memorandum prepared by Ralph M. Diaz, Secretary (Secretary) of the California Department of Corrections and Rehabilitation (CDCR) dated November 7, 2019, and the investigative report to the commissioners prepared by Steve Hay BPH senior investigator dated December 5, 2019.

On December 23, 2019, the trial court filed an order declining to follow the BPH's recommendation to recall petitioner's sentence. Petitioner filed a notice of appeal from the court's ruling. On March 13, 2020, this court filed an opinion reversing the trial court's ruling on the basis it failed to conduct a hearing as required by statute. (*People v. Laudenback* (G058714, Mar. 13, 2020) [nonpub. opn.] (*Laudenback I*).) This court's

---

[2] On the court's own motion, the court takes judicial notice of the correspondence and its attachments filed by the BPH on December 20, 2019, in Superior Court of Orange County case No. 94HF0192. (Evid. Code, §§ 459, 452.)

opinion explained that on remand, the court was to "consider only section 1170(e)(2)'s criteria[,]" and the "trial court reviews BPH's decision for some evidence, and not de novo." (*Laudenback I, supra*, G058714.)

On April 3, 2020, the trial court conducted a hearing to consider the BPH's recommendation to recall petitioner's sentence to grant compassionate release pursuant to section 1170(e). The court began the hearing by stating that "in light of the current state of emergency due to the COVID-19 [p]andemic . . . [the] [c]ourt is conducting [the] hearing on a motion for compassionate release by way of video appearances for the parties . . . as well as livestreaming to satisfy the public hearing requirement."

At the conclusion of the hearing, the court stated it "reviewed the correspondences from the [CDCR], as well as all of the correspondences submitted on behalf of the victim, as well as on behalf of [petitioner]," and "den[ied] the motion" to recall petitioner's sentence. First, the court found there was "some evidence" to support the fact petitioner was suffering from stage IV bladder cancer and he had an estimated life expectancy of less than six months.

Second, the court found that if released, petitioner posed a threat to public safety. The court stated the following: "On the second finding, however, the [c]ourt does find that he will continue to pose a threat to public safety. And the [c]ourt will note that the [c]ourt's basis for making this finding is based on the [c]omprehensive [r]isk [a]ssessment by the [CDCR] where it was noted that [petitioner] has a lack of regard for rights and safety of others; that he has antisocial behaviors; and that he lacks true empathy and remorse for his actions. [¶] Notwithstanding the medical diagnosis in his case, there is nothing that the [c]ourt can find in those diagnoses to indicate that he is physically incapacitated or that he would be prevented from living a normal life, moving about. In fact, in his interviews with the [CDCR] -- or the [BPH], he indicated that his wish was to find employment if released from prison. [¶] And so based on the risk assessment of his personality, the [c]ourt does not have any confidence that he will not

pose a threat to public safety at this time. [¶] So, based on those findings, the [c]ourt is going to deny the motion for compassionate release."

On April 16, 2020, petitioner filed a petition for writ of habeas corpus in this court. Petitioner argues the trial court used the incorrect standard of review and states that "instead of determining whether or not the [BPH]'s finding that [petitioner's] release would pose a danger to society is supported by 'some evidence[,]' as this [c]ourt ordered it to do, the trial court abused its discretion by finding 'some evidence' that he would pose a danger to the public if released."

Because of the urgent nature of the petition, this court exercised its discretion to treat the petition as a petition for writ of mandate (*People v. Picklesimer* (2010) 48 Cal.4th 330, 335; *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205 (*Robbins*)), and ordered real party in interest the Attorney General to file opposition to the petition no later than April 20, 2020. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180 (*Palma*).) The Attorney General complied.

DISCUSSION

Section 1170(e)(1), states, "Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the [BPH] or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the [BPH] may recommend to the court that the prisoner's sentence be recalled."

To be considered for compassionate release, an inmate must satisfy two of the three criteria identified in section 1170(e)(2). The inmate must be either "terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department," or "permanently medically incapacitated." (§ 1170(e)(1), (2)(A), (C).) In addition to either a terminal illness or permanent incapacitation, the statute also requires "the secretary or

the [BPH]" to find "[t]he conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety." (§ 1170(e)(1), (2)(B).)

In order for a trial court to consider a compassionate release request, the secretary or the BPH has either recommended an inmate's sentence be recalled, or declined the inmate's request for recall. When this occurs, section 1170(e)(2), states, "The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist." The court's decision to recall an inmate's sentence is reviewed for an abuse of discretion. (*People v. Loper* (2015) 60 Cal.4th 1155, 1161, fn. 3.)

In response to petitioner's claim the trial court used the incorrect standard to review the BPH's recommendation, the Attorney General states, "The issue is whether the trial court abused its discretion in finding the absence of 'some evidence' supporting the [BPH's] conclusion that [p]etitioner did not pose a threat to public safety and denying [p]etitioner's request for compassionate release on that basis." The Attorney General explains that, "On the second prong, although the court did not expressly repeat the 'some evidence' standard, it impliedly found the absence of 'some evidence' supporting BPH['s] conclusion that [p]etitioner did not pose a threat to public safety. The court found that [p]etitioner posed a threat to public safety based on [a] psychologist's notations in the CDCR's comprehensive risk assessment and statements in the BPH file indicating his mobility." The Attorney General urges this court to deny the petition because "the trial court applied the legal standard directed by this [c]ourt and considered whether he would pose a threat to public safety as this [c]ourt directed." The trial court did not apply the legal standard we articulated in *Laudenback I, supra,* G058714.

The Attorney General's argument "There is ample support for the trial court's finding that [p]etitioner's release would pose a threat to public safety" misses the point. As we explained in *Laudenback I, supra,* G058714, the trial court's role was not to

consider and make its own findings on the criteria set forth in section 1170(e)(2), but to "review[] [the] BPH's decision for some evidence, and *not de novo*." (Italics added.)

Although raised in a slightly different context, *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578 (*Martinez*), confirms the "some evidence" standard. The court stated the following, "When BPH declines to recommend a prisoner for recall of sentence because it finds the prisoner could pose a threat to public safety if released from state prison, the standard of judicial review is the same as that used when reviewing a decision by BPH to deny parole, i.e., 'whether "some evidence" *supports the conclusion' of BPH* that the prisoner does not come within the statutory criteria. [Citation.] This standard of review is 'highly deferential' to BPH's fact finding. [Citation.] It does not permit a court to second-guess BPH's fact finding. Our role is narrow. A court has the authority to do no more than 'ensure that [BPH's] decision reflects "an individualized consideration of the specified criteria" and is not "arbitrary and capricious,"' [citation] i.e., that BPH's decision is supported by '"some evidence"' viewed in the light most favorable to the decision. [Citation.]" (*Id.* at pp. 593-594, italics added.)

When *Martinez* considered whether the inmate could pose a threat to public safety, it added the following: "Might reasonable minds disagree? Sure. However, that is not our call as judges. We must be highly deferential to BPH's factfinding, with the recognition that BPH is entitled to be '"cautious"' and '"stringent"' in deciding whether '[t]he conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.' [Citation.] Accordingly, we must uphold BPH's decision if it is supported by some evidence viewed in the light most favorable to the decision. [Citation.]" (*Martinez, supra,* 183 Cal.App.4th at p. 595.)

Here, there's no indication the trial court reviewed or even considered the BPH's decision. In its ruling, the court stated as follows: "[T]he [c]ourt does find that he will continue to pose a threat to public safety. And the [c]ourt will note that the [c]ourt's

basis for making this finding is based on the [c]omprehensive [r]isk [a]ssessment by the [CDCR] where it was noted that [petitioner] has a lack of regard for rights and safety of others; that he has antisocial behaviors; and that he lacks true empathy and remorse for his actions."

The Attorney General acknowledges the trial court did not reference the "some evidence" standard, but suggests the court "impliedly found the absence of 'some evidence' supporting the BPH['s] conclusion that Petitioner did not pose a threat to public safety." We disagree.

The trial court's comments support the conclusion it independently reviewed the record. Additionally, based on the record, it doesn't seem possible the court could determine there was a complete lack of "some evidence" to support the BPH's decision petitioner's release would not pose a threat to public safety. Indeed, all of the evidence before the court suggested otherwise.

The trial court relied on the 2016 comprehensive risk assessment to conclude petitioner's release would pose a threat to public safety. Although the assessment found petitioner represented a low risk for violence, the Attorney General states, "the court was concerned with the psychologist's statement . . . that: 'It should be noted that a low risk is not indicative of a lack of any risk for violence." To support the court's ruling, the Attorney General cites to risk factors such as petitioner's history of problems in romantic relationships, his need for ongoing substance abuse treatment, and his "demonstrated superficial emotional response and apparent continued lack of genuine remorse."

The Attorney General argues further that the conclusion petitioner represented a low risk of violence was based on the condition he will be released on parole which necessarily includes supervision, intervention, and monitoring, and "compassionate release does not provide for any post-release supervision, intervention, or monitoring." The Attorney General states, "[i]n its decision to recommend [p]etitioner

for compassionate release, BPH did not address any of these concerns regarding [p]etitioner's future risk of violence other than to make conclusory statements that [p]etitioner did not pose a threat to public safety."

Again, we disagree. Although the BPH's decision to recommend petitioner's sentence be recalled is recorded in a single paragraph, the BPH's December 20, 2019, to the trial court made clear the decision was based on the documents attached to the letter, including the same 2016 comprehensive risk assessment that the trial court relied on to reach the opposite result. The court relied on language in the assessment that petitioner "has a lack of regard for rights and safety of others; that he has antisocial behaviors; and that he lacks true empathy and remorse for his actions[.]" But the court ignored the assessment's overall conclusion that if granted parole, "[petitioner] represents a [l]ow risk for violence. He presents with non-elevated risk relative to long-term inmates and other parolees. Low-risk examinees are expected to commit violence much less frequently than all other parolees."

Although the comprehensive risk assessment made clear "low risk is not indicative of a lack of any risk for violence," the BPH's conclusion petitioner would not pose a threat to public safety was supported by the evaluator's insight into why petitioner represented a low risk for violence, which he explained was "due to [his] demonstration of skills for managing stressors without resorting to violence for many years. He has been participating actively in rehabilitation programming including substance abuse services. His participation in these programs appears to have had generally positive results. He has prepared a relapse prevention plan that addresses his substance abuse history and identifies strategies he may use to refrain from substance use in the community. He has made explicit plans for re-entry that include professional services that are intended to assist him with making an adequate transition to community living. He also has a support system consisting of his mother, father, . . . sponsors, and church leaders. Should he be able to obtain and present documented evidence of his reported

offers of housing and employment as well as acceptance to transitional programs, he will be able to further lower his risk."

Following petitioner's diagnosis, the October 2019 diagnostic study report was the first report that addressed factors to determine whether petitioner was a suitable candidate for compassionate release. The report, which the BPH reviewed, documented that petitioner had no criminal history other than the current offense, and during his 24-year incarceration, petitioner had one rule violation for hair length.

In addition to the BPH's recommendation, the Secretary also recommended petitioner's sentence be recalled and granted compassionate release. Section 1170(e)(1), states that either the "secretary or the [BPH] or both" may recommend to the court the inmate's sentence be recalled. In this case, both the BPH and the Secretary recommended petitioner's sentence be recalled and he be granted compassionate release. In a November 2019 memorandum, the Secretary stated, "it is my recommendation the current prison commitment and sentence of [petitioner] be recalled." With respect to evidence that addressed whether petitioner would pose a threat to the public if released, the Secretary noted that "[petitioner] has no other criminal history," and his disciplinary history included the one rule violation. The Secretary's recommendation concludes by stating the following, "It is my assessment, [petitioner] would not pose a threat to public safety if he were released from prison. [¶] In light of the forgoing, [petitioner's] sentence should be recalled. His record makes it clear that he is a suitable candidate for recall of commitment."

In addition to the Secretary's recommendation, the BPH also considered investigator Hay's December 2019 report to the commissioners prepared in response to Castrejon's diagnosis. The report identified petitioner's terminal diagnosis, the unlikelihood of short term improvement based on "rapid decompensation," and petitioner's estimated life expectancy of "six months or less without treatment." The

report stated petitioner is currently ambulatory, but the condition is expected to change in the future, and it is anticipated that if released, petitioner would reside with his mother.

In addition to Dr. Castrejon's diagnosis, Hay also interviewed petitioner's attending physician Dr. L. Sprague, who confirmed petitioner's terminal diagnosis. According to Hay, Sprague indicated the following: "[Petitioner's] cancer is progressive and she expects his condition to deteriorate significantly within the next few months. He has been observed to be losing weight, become weaker, has shortness of breath, and lacks stamina. It is anticipated that he will be admitted to the hospital in the near future and will not be able to remain on general population." Attached to Hay's report was a disability evaluation that stated petitioner could not lift more than 19 pounds.

The Attorney General's claim the trial court reviewed the BPH's decision and "impliedly found the *absence of 'some evidence*'" to support the BPH's conclusion petitioner does not pose a threat to public safety is without merit. Due to the overwhelming evidence that supports the BPH's conclusion, the court's ruling was an abuse of discretion. "Although mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue 'where, under the facts, that discretion can be exercised in only one way.' [Citations.]" (*Robbins*, *supra*, 38 Cal.3d at p. 205.)

Even if the trial court considered the issue de novo, the record in this case and the court's reliance on the 2016 comprehensive risk assessment as the basis for declining to follow the BPH's recommendation do not support a finding petitioner poses a threat to public safety if released and thus represents an abuse of discretion.

The trial court's additional reason for its conclusion petitioner's release would pose a threat to public safety is also unpersuasive. The court noted, "there is nothing that the [c]ourt can find in those diagnoses to indicate that he is physically incapacitated or that he would be prevented from living a normal life, moving about. In fact, in his interviews with the department -- or the parole board, he indicated that his wish was to find employment if released from prison."

According to the Attorney General, "the trial court correctly noted that [p]etitioner's medical condition had not limited his physical mobility. The evidence before the trial court showed that appellant was able to conduct his regular activities, continue his work as a porter, and that he was seeking potential employment in anticipation of his release."

Section 1170(e), requires petitioner to be either "terminally ill with an incurable condition" or "permanently medically incapacitated." (§ 1170(e)(2)(A), (C).) The court concluded there was "'some evidence' to support that [petitioner] is suffering from bladder cancer, stage IV . . . and . . . he has an estimated life expectancy of less than six months." There's no requirement that a terminally ill patient must also be physically incapacitated or unable to "mov[e] about" to be considered for compassionate release. In fact, section 1170 anticipates the inmate may receive medical attention and contemplates "the prisoner [could] be released or receive treatment . . . ." (§ 1170(e)(2)(B).) In this case, the BPH was well aware this could be the case based on the compassionate release chrono that stated upon discharge and release, petitioner would need "transportation to any medical visits."

Likewise, the trial court's belief petitioner, while suffering from a terminal illness with less than six months to live, who was deteriorating, becoming weaker, and unable to lift more than 19 pounds, and experiencing shortness of breath and reduced stamina, poses a threat to public safety because he might seek employment, strains credulity. Under normal circumstances, it is unlikely petitioner could obtain gainful employment in his physical condition. In the midst of "the current state of emergency due to the COVID-19 Pandemic," it is extremely unlikely.[3] This was an abuse of discretion.

---

[3] On March 19, 2020, because of the COVID-19 threat, Governor Gavin Newsom issued a stay at home order, except as needed to maintain continuity of operation of the federal critical infrastructure sectors, critical government services,

DISPOSITION

Inasmuch as real party was given notice pursuant to *Palma*, *supra*, 36 Cal.3d at page 180, the petition is GRANTED. Let a peremptory writ of mandate issue ordering respondent court to vacate its ruling entered on April 3, 2020, and enter a ruling no later than two court days after this opinion is filed, granting the BPH's recommendation to recall petitioner's sentence and grant compassionate release pursuant to section 1170(e).

The order granting the BPH's recommendation to recall petitioner's sentence shall be transmitted to the CDCR no later than two court days after this court's opinion is filed and shall state the following: "Provided release does not jeopardize petitioner's health, the California Department of Corrections and Rehabilitation shall release Brian John Laudenback within two court days from the date of this order to a location where access to care is available."

Respondent trial court is further ordered to transmit by facsimile no later than two court days after this court's opinion is filed, the amended abstract of judgment or the court's minute order to (1) the Case Records Manager, California Men's Colony at (805) 547-7508, (2) the Classification Services Unit at (916) 445-0864, and (3) transmit the original abstract of judgment or minute order to California Men's Colony at P.O. Box 8101, San Luis Obispo, California, 93409-8101.

In the interest of justice, the opinion in this matter is deemed final as to this court forthwith, and the clerk is directed to issue the remittitur forthwith. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

---

schools, childcare, and construction. (Governor's Exec. Order No. N-33-20 (Mar. 19, 2020).)